

SENATE NO. 1076

AN ACT RELATIVE TO WORKER'S COMPENSATION

*Be it enacted by the Senate and House of Representatives in General Court assembled,
And by the authority of the same, as follows:*

1 SECTION 1. Section (1) of chapter 152 of the General Laws, as appearing in the 2000 Official

2 Edition, is hereby amended as follows:—

3 The following words as used in this chapter shall, unless a different meaning is plainly required by the
4 context or specifically prescribed, have the following meanings:

5 “Average Weekly Wage”, the earnings of the injured employee during the period of twelve calendar
6 months immediately preceding the date of injury, divided by fifty-two; but if the injured employee lost
7 more than two weeks’ time during such period, the earnings the remainder of such twelve calendar
8 months shall be divided by the number of weeks remaining after the time so lost has been deducted.

9 Where, by reason of the shortness of time during which the employee has been in the employment of
10 his employer, or the nature or terms of the employment, it is impracticable to compute the average
11 weekly wages, as above defined, regard may be had to the average weekly amount which, during the
12 twelve months previous to the injury, was being earned by a person in the same grade employed at the
13 same work by the same employer, or, if there is no person so employed, by a person in the same grade
14 employed in the same class of employment and in the same district. In case the injured employee is

15 employed in the concurrent service of more than one employer, his total earnings from the several
16 employers shall be considered in determining his average weekly wages. Weeks in which the
17 employee received less than four hours in wages shall be considered time lost and shall be excluded in
18 determining his average weekly wages; provided, however, that this exclusion shall not apply to
19 employees whose normal working hours in the service of the employer are less than fifteen hours each
20 week. Except as provided by section twenty-six of chapter one hundred forty-nine, such fringe
21 benefits as health insurance plans, pension, day care, or education and training programs provided by
22 employers shall not be included in employee earnings for the purpose of calculating average weekly
23 wages under this section.

24 SECTION 2. Section 1(7A) of said chapter 152, as so appearing, is hereby amended as follows:—
25 “Personal injury” includes infectious or contagious diseases if the nature of the employment is such
26 that the hazard of contracting such diseases by an employee is inherent in the employment. “Personal
27 injury” shall not include any injury resulting from an employees’ purely voluntary participation in any
28 recreational activity, including but not limited to athletic events, parties, and picnics, even though the
29 employer pays some or all of the costs thereof. Personal injuries shall include mental or emotional
30 disabilities only where a significant contributing cause of such disability in an event or series of events
31 occurring within any employment. If a compensable injury or disease combines with a pre-existing
32 condition which resulted from an injury or disease not compensable under this chapter, to cause or
33 prolong disability or a need for treatment, the resultant condition shall be compensable only to the
34 extent such compensable injury or disease remains a major but not necessarily predominant cause of
35 disability or need for treatment. No mental or emotional disability arising principally out of a bona
36 fide, personnel action including a transfer, promotion, demotion, or termination except such action

37 which is the intentional infliction of emotional harm shall be deemed to be a personal injury within the
38 meaning of this chapter.

39 SECTION 3. Section 6 of said chapter 152, as so appearing, is hereby amended by changing the last
40 paragraph as follows:—

41 Any person who violates the provisions of this section in any year shall be punished by a fine of one
42 hundred dollars for the first such violation. If subsequent violations occur within said year, the fine
43 shall be increased by one hundred dollars for each subsequent violation. If an employer fails to make
44 such notice to the division of administration, the employee and the insurer, it shall pay an additional
45 penalty to the department of one thousand dollars into the special fund created pursuant to section
46 sixty-five and one thousand dollars to the employee; provided, however, that such additional penalty
47 shall be ten thousand dollars if said notice to the division of administration, the employee and the
48 insurer, is not made within ninety days. Penalties under this section may be waived if an
49 administrative judge finds that the failure to comply with the requirements herein set forth was due to
50 events beyond the control of the employer or its agents. No additional penalties shall be levied for
51 continuing violations under this section, but the employer shall be allowed no defenses against any
52 initial claim for weekly benefits until any penalty owed under this section has been paid. No amount
53 paid as a penalty under this section shall be included in any formula utilized to establish premium rates
54 for workers' compensation insurance. An employer's inability to defend on any issue shall not relieve
55 an employee of the burden of proving each element of any case.

56 SECTION 4. Section 7(2) of said chapter 152, as so appearing, is hereby amended as follows:—

57 If an insurer fails to commence such payment or make such notification within fourteen days, it shall
58 pay to the employee a penalty in an amount equal to two hundred dollars or his compensation rate as

59 calculated under section 34 of this chapter, whichever is higher. If an insurer fails to commence such
60 payment or make such notification within sixty days, it shall pay an additional penalty to the
61 department of one thousand dollars into the special fund created pursuant to section sixty-five, and one
62 thousand dollars to the employee. Provided, however, that such additional penalty shall be ten
63 thousand dollars if said payment is not commenced and such notice not made within ninety days.
64 Penalties under this section may be waived if an administrative judge finds that the failure to comply
65 with the requirements herein set forth was due to events beyond the control of the insurer or its agents.
66 No additional penalties shall be levied for continuing
67 violations under this section, but the insurer shall be allowed no defenses against any initial claim for
68 weekly benefits until any penalty owed under this section has been paid. No amount paid as a penalty
69 under this section shall be included in any formula utilized to establish premium rates for workers'
70 compensation insurance. An insurer's inability to defend on any issue shall not relieve an employee of
71 the burden of proving each element of any case.

72 SECTION 5. Section 8 of said chapter 152, as so appearing, is hereby amended as follows:—

73 (1) An insurer which makes timely payments pursuant to subsection one of section seven, may make
74 such payments for a period of ninety calendar days from the commencement of disability without
75 affecting its right to contest any issue arising under this chapter. An insurer may terminate or modify
76 payments at any time within such ninety day period without penalty if such change is based on the
77 actual income of the employee or if it gives the employee and the division of administration at least
78 seven day written notice of its intent to stop or modify payments and contest any claim filed. The
79 notice shall specify the grounds and factual basis for stopping or modifying payment of benefits and
80 the
81 insurer's intention to contest any issue and shall state that in order to secure additional benefits the

82 employee shall file a claim with the department and insurer within any time limits provided by this
83 chapter.

84 SECTION 6. Section 8(4) of said chapter 152, as so appearing, is hereby amended as follows:—

85 An insurer who makes prompt payment of benefits pursuant to section seven and continues payment
86 for ninety days or more, without contesting liability, may, no sooner than sixty days following the
87 referral to the industrial accident board of a complaint for termination or reduction of benefits under
88 section thirty-four, thirty-four A or thirty-five, if no conference order has been issued during such sixty
89 day period, request the senior judge to appoint an impartial physician to examine the employee. The
90 senior judge shall, within seven days of a request for an impartial examination, appoint a physician
91 from the appropriate roster to conduct an examination of the employee and make a report within
92 fourteen days. If such report contains evidence of increased capability to work, the insurer may reduce
93 or terminate benefits in accordance with such report, pursuant to the provisions of section thirty-five
94 D. In such instances, if the requirements of this subsection have been complied with, when an order is
95 issued on the insurer's complaint, if such order requires that retroactive weekly benefits are due the
96 employee, an additional payment equal to two times the average weekly wage in the commonwealth
97 shall also be paid to the employee.

98 SECTION 7. Section 8(6) of said chapter 152, as so appearing, is hereby amended as follows:—

99 (6) Any ninety day payment without prejudice period herein provided may be extended in ninety day
100 increments not to exceed one year by agreement of the parties provided that:
101 (a) the agreement sets out the last day of such extension; and
102 (b) a conciliator, administrative judge, or administrative law judge approves such agreement as not
103 detrimental to the employee's case.

104 SECTION 8. Section 13A(5) of said chapter 152, as so appearing, is hereby amended as follows:—
105 Whenever an insurer files a complaint or contests a claim for benefits and then either (i) accepts the
106 employee's claim or withdraws its own complaint within ten days of the date set for a hearing pursuant
107 to section eleven; or (ii) the employee prevails at such hearing the insurer shall pay a fee to the
108 employee's attorney in an amount equal to three thousand, five hundred dollars plus necessary
109 expenses. An administrative judge may increase or decrease such fee based on the complexity of the
110 dispute or the effort expended by the attorney.

111 SECTION 9. Section 28, paragraph 1, of said chapter 152, as so appearing, is hereby amended as
112 follows:—

113 If an employee is injured by reason of the serious and willful misconduct of the employer or of any
114 person regularly entrusted with and exercising the powers of superintendence, the amounts of
115 compensation hereinafter provided shall be doubled. In case the employer is insured, he shall repay to
116 the insurer the extra compensation paid to the employee. If a claim is made under this section, and the
117 employer is insured, the employer may appear and defend against such claim only. The employment of
118 any minor, known to be such, in violation of any provision of sections sixty to seventy-four, inclusive,
119 or of section one hundred and four of chapter one hundred and forty-nine, or a knowing and willful
120 violation of the Federal and/or State O.S.H.A. standards shall constitute serious and willful misconduct
121 under this section.

122 SECTION 10. Section 29 of said chapter 152, as so appearing, is hereby amended as follows:—

123 No compensation pursuant to section thirty-four or thirty-five shall be paid for any injury which does
124 not incapacitate the employee from earning full wages for a period of five or more calendar days. If
125 incapacity extends for a period of five days or more, compensation shall be paid from the date of onset

126 of incapacity. Except as otherwise provided in this chapter no compensation shall be paid for any
127 period for which any wages were earned. No mental or emotional disability arising principally out of a
128 bona fide, personnel action including a transfer, promotion, demotion, or termination except that such
129 action which is the intentional infliction of emotional harm shall be deemed to be a personal injury
130 within the meaning of this chapter.

131 SECTION 11. Section 30, paragraph 1, of said chapter 152,
132 as so appearing, is hereby amended as follows:—

133 The insurer shall furnish to an injured employee adequate and reasonable health care services, and
134 medicines if needed, together with the expenses necessarily incidental to such services, and in the case
135 of an injured employee, a physical examination shall be given at least once a year while the employee
136 is hospitalized. Except for the employee's first scheduled appointment, which, pursuant to the terms of
137 a preferred provider arrangement entered into under this section may be required to be with a health
138 care provider within the plan, the employee may select a treating health care professional other than
139 any provided or agreed to treating health care professional to another provider in a particular specialty,
140 the employee may also change twice to a different provider in such specialty. In cases of emergency or
141 where the insurer or administrative judge agree, the employee may seek treatment from additional
142 providers. Where services are provided to employees under this section, the reasonable and necessary
143 cost of such services shall be paid by the insurer.

144 SECTION 12. Section 31, paragraph two, of said chapter 152, as so appearing, is hereby amended as
145 follows:—

146 To the widow or widower, so long as he or she remains unmarried, a weekly compensation equal to
147 two-thirds of the average weekly wages of the deceased employee, but not more than the average

148 weekly wage of the commonwealth, as determined according to the provisions of subsection (a) of
149 section twenty-nine of chapter one hundred and fifty-one A, and promulgated by the commissioner of
150 the department of employment and training on or before October first preceding the deceased
151 employee's injury or death; provided, however, that in no instance shall said widow or widower,
152 receive less than two hundred dollars per week, to the widow or widower twelve dollars more a week
153 for each child of the deceased employee under the age of eighteen or over said age and physically or
154 mentally incapacitated from earning, or over said age and a full time student qualified for exemption
155 as a dependent under section one hundred and fifty-one (e) of the Internal Revenue Code, except that
156 no additional compensation for the benefits of the children of the employee shall be payable when
157 combined with the compensation due the spouse of the deceased employee as hereinbefore provided in
158 this section would allow the widow or widower an amount in excess of two hundred fifty dollars per
159 week; provided that in case any child of the deceased employee is a child by a former wife or husband,
160 the death benefit shall be divided between the surviving wife or husband and all dependent children of
161 the deceased employee in equal shares, the surviving wife or husband taking the same share as the
162 child. If the widow or widower dies or if there is no surviving wife or husband of the deceased
163 employee, such amount or amounts as would have been payable to or for his or her own use and for
164 the benefit of all the children of the employee shall be paid in equal shares to all the surviving
165 children of the employee.

166 SECTION 13. Section 33 of said chapter 152, as so appearing, is hereby amended as follows:—

167 In all cases, the insurer shall pay the reasonable expenses of burial, not exceeding six thousand dollars.

168 SECTION 14. Section 34 of said chapter 152, as so appearing, is hereby amended as follows:—

169 While the incapacity for work resulting from injury is total, during each week of incapacity, the insurer

170 shall pay the injured employee compensation equal to two-thirds of his or her average weekly wage
171 before the injury, but not more than the maximum weekly compensation rate, unless the average
172 weekly wage of the employee is less than the minimum weekly compensation rate, in which case said
173 weekly compensation shall be equal to his average weekly wage. The total number of weeks of
174 compensation due the employee under this section shall not exceed two hundred eight.

175 SECTION 15. Section 34A of said chapter 152, as so appearing, is hereby amended as follows:—

176 While the incapacity for work resulting from the injury is both permanent and total, the insurer shall
177 pay to the injured employee, a weekly compensation equal to two-thirds of his average weekly wage
178 before the injury, but not more than the maximum weekly compensation nor less than the minimum
179 weekly compensation rate.

180 SECTION 16. Section 34B, paragraph one of said chapter 152, as so appearing, is hereby amended as
181 follows:—

182 October first of each year shall be the review date for the purposes of this section.

183 Any person receiving or entitled to receive benefits under the provisions of section thirty-one, section
184 thirty-four, section thirty four A, or section thirty-five, whose benefits are based on a date of personal
185 injury at least twenty-four months prior to the review date shall have his weekly benefit adjusted,
186 without application, in accordance with the following provisions; provided, however, that no increase
187 in benefits shall be payable which reduce any benefits the recipient is receiving pursuant to federal
188 social security law.

189 SECTION 17. Section 34B, paragraph (b) of said chapter 152, as so appearing, is hereby amended as
190 follows:—

191 The death benefit under section thirty-one, or the temporary total disability benefit under section

192 thirty-four, or the partial disability benefit under section thirty-five, or the total disability benefit under
193 section thirty-four A that was being paid prior to any adjustments under this section shall be the base
194 benefit. The base benefit shall be changed on each review date by the percentage as calculated in
195 paragraph (a); the resulting amount shall be termed the adjusted benefit and is the amount of benefit to
196 be paid on and after the review date. If the adjusted benefit is larger than the base benefit, the
197 difference shall be termed the supplemental benefit. In no instance shall the adjusted benefit under this
198 section be greater than three times the base benefit.

199 SECTION 18. Section 35, paragraph one of said chapter 152, as so appearing, is hereby amended as
200 follows:—

201 While the incapacity for work resulting from the injury is partial, during each week of incapacity the
202 insurer shall pay the injured employee a weekly compensation rate equal to sixty-six and two-thirds
203 percent of the difference between his or her average weekly wage before the injury and the weekly
204 wage he or she is capable of earning after the injury, but not more than the maximum weekly
205 compensation rate.

206 SECTION 19. Section 35, paragraph two of said chapter 152, as so appearing, is hereby amended as
207 follows:—

208 The total number of weeks of compensation due the employee under this section shall not exceed four
209 hundred forty-two; provided, however, that this number may be extended if an insurer agrees or an
210 administrative judge finds that the employee has, as a result of a personal injury under this chapter,
211 suffered a permanent loss of seventy-five percent or more of any bodily function or sense, including
212 but not limited to those specified in paragraph (a), (b), (e), (f), (g), or (h) of subsection (1) of section
213 thirty-six, developed a permanently life-threatening physical nature and cause. Where applicable,

214 losses under this section shall be determined in accordance with standards set forth in the American
215 Medical Association Guides to the Evaluation of Permanent Impairments. Where the insurer agrees or
216 the administrative judge finds such permanent partial disability as is described in this paragraph, the
217 total number of weeks the employee may receive benefits under this section is left to the discretion of
218 the administrative judge.

219 SECTION 20. Section 35A, paragraph one of said chapter 152, as so appearing, is hereby amended as
220 follows:—

221 Where the injured employee has persons conclusively presumed to be dependent upon him or in fact
222 so dependent, the sum of twelve dollars shall be added to the weekly compensation payable under
223 section thirty-four, thirty-four A and thirty-five, for each person wholly dependent on the employee,
224 but in no case shall the aggregate of such amounts exceed the average weekly wage of the employee.
225 No weekly payment to the employee under this section shall allow the employee to receive an amount
226 in excess of two hundred fifty dollars per week when combined with the compensation due under
227 sections thirty-four, thirty-five and thirty-four A. For the purposes of this section the following persons
228 shall be conclusively presumed to be wholly dependent for support upon an employee.

229 SECTION 21. Section 35D(5) of said chapter 152, as so appearing, is hereby amended as follows:—
230 Implementation of this section is subject to the procedures contained in section eight. For the purposes
231 of this chapter, a suitable job or employment shall be any job that the employee is physically and
232 mentally capable of performing, including light work, considering the nature and severity of the
233 employee's injury, so long as such job bears a reasonable relationship to the employee's work
234 experience, education, or training either before or after the employee's injury. The fact that an
235 employee has enrolled or is participating in a vocational rehabilitation program, whether or not it is

236 paid for by the insurer or the department, shall not be used to support the contention that the
237 employee's compensation rate should be decreased in any proceeding under this chapter

238 SECTION 22. Chapter 152 is hereby further amended by striking out section 35E, as so appearing, and
239 inserting in place thereof the following section:—

240 Any person receiving old age benefits pursuant to federal social security law or receiving pension
241 benefits paid in part or entirely by an employer shall not be entitled to benefits under section thirty-
242 five, unless such employee can establish that but for the injury, such employee would have remained
243 active in the labor market. Claims for compensation, or complaint for modification, or discontinuance
244 of benefits based on this section shall not be filed more often than once every twelve months.

245 SECTION 23. Section 36(k) of said chapter 152, as so appearing, is hereby amended as follows:—

246 For bodily disfigurement, an amount which, according to the determination of the member or the
247 reviewing board, is a proper and equitable compensation, not to exceed twenty thousand dollars; which
248 sum shall be payable in addition to all other sums due under this section.

249 SECTION 24. Section 50 of said chapter 152, as so appearing, is hereby amended as follows:—

250 Whenever payments of any kind are not made within sixty days of being claimed by an employee,
251 dependent or other party, and an order or decision requires that such payments be made, interest at the
252 rate of twelve percent per annum of all sums due from the date of the receipt of the notice of the claim
253 by the department to the date of payment shall be required by such order or decision. Whenever such
254 sums include weekly payments, interest shall be computed on each unpaid weekly payment.

